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No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

BRIEF OF LAWRENCE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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[1]As used in this brief, "State" refers to the Petitioners, Robert D. Orr, et al.; "Lawrence Respondents" refers to the Metropolitan School Districts of Decatur, Lawrence, Warren and Wayne Townships; "IPS" refers to the Indianapolis Public Schools; "State Petition" refers to the petition for certiorari filed by the State; and "State App." refers to the appendix included in the State Petition.

The only issue involved in this case, as noted by both the majority and the dissent in the Seventh Circuit Court of Appeals ("Seventh Circuit"), is who shall pay the costs of the interdistrict school desegregation plan in Marion County, Indiana. State App. A-2, A-14. The District Court imposed these costs on the State of Indiana, on the grounds that it was the State's violation of the Constitution which served as the basis of the interdistrict remedial orders. State App. A-41. The Seventh Circuit affirmed, stating that the District Court "did what was within its authority — order a wrongdoer to pay the cost of remedying its wrongdoing." State App. A-11.

Lawrence Respondents submit that the Seventh Circuit did not err in affirming the District Court's decision and, consequently, that the State Petition should be denied.

Statement of Case Relevant to this Appeal

This case has been pending since 1968 and, consequently, previous opinions have traced its history. *See*, 637 F.2d 1101 (7th Cir. 1980). This history will not be repeated here but instead Lawrence Respondents will summarize only those facts and circumstances leading to the District Court's order that is the subject of the State Petition.

In 1980, this Court denied petitions and cross-petitions for writs of certiorari to the Seventh Circuit seeking review of a decision by that court which had affirmed the District Court's order regarding both the validity and scope of a school desegregation plan for Marion County, Indiana. 637 F.2d 1101, *cert. denied*, 449 U.S. 838 (1980). This denial of certiorari meant that at least the following determinations became the law of this case:

1. The State's adoption of certain statutes, principally the "Uni-Gov" legislation, inhibited desegregation in Marion County, Indiana, and formed the legal basis, within the meaning of *Millikin v. Bradley*, 418 U.S. 717 (1974), for the imposition of an interdistrict school remedy. 637 F.2d 1105-8, 1112-4.

2. Although certain actions of the Housing Authority of the City of Indianapolis ("HACI") also contributed to desegregation in Marion County, Indiana, 637 F.2d 1108-11, these actions would not support the desegregation plan ordered by the District Court but would have supported only a more limited plan. 637 F.2d at 1114.

3. IPS' acts of *de jure* segregation within its own school boundaries did not contribute to interdistrict desegregation in Marion County, Indiana. 637 F.2d at 1111-2.

4. The Indiana Transfer Act did not provide an independent basis for the imposition of an interdistrict desegregation remedy. 637 F.2d at 1112.

5. The District Court's plan of interdistrict school desegregation, a plan requiring the transfer of certain black IPS students to suburban Marion County school corporations, but not otherwise ordering any reorganization of the school corporations, was an appropriate remedy for the interdistrict violations found by the District Court. 637 F.2d 1112-5.

6. No suburban school district committed any act of *de jure* segregation. In 1973, the District Court stated, "There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. 368 F.Supp. 1191, 1203. The District Court restated this finding in its 1981 decision, "This Court found no constitutional violation by the Added School Defendants." State App. A-40. The dissent in the Seventh Circuit acknowledged "that the suburban school districts were absolved from any share of legal liability for the segregation of the Marion County schools." State App. A-16.

This Court's denial of the petitions and cross-petitions for certiorari in 1980 meant that interdistrict school desegregation would take place in Marion County starting

with the 1981-82 school year in accordance with the District Court's plan which transferred specified numbers of black IPS students to surrounding Marion County school districts. Lawrence Respondents constituted four of the six school districts charged with the responsibility of educating those black school children. Early in 1981, it became apparent that there were serious questions as to who would pay the cost of educating those black IPS students in these districts.

The State appeared content to rely upon the Indiana Transfer Act,[2] first adopted in 1974, which, if applicable, would have placed the majority of these costs on IPS and limited the State's liability to essentially one-half of the costs of transportation. The 1981 Indiana General Assembly, however, had adjourned without appropriating any monies to fund the state's obligations under that statute. State App. A-2. IPS, on the other hand, could not assure the suburban school districts that it would pay the costs of desegregation imposed on it under the Indiana Transfer Act, in part, because IPS questioned the applicability of that act to this case and, in addition, as the District Court subsequently found, IPS was in a deficit financial position and could not pay those costs. State App. A-42.

Neither IPS, nor the suburban school corporations, such as Lawrence Respondents, could simply raise their own taxes to pay for these costs and then await the conclusion of any dispute between IPS and the State regarding responsibility for those costs. School district tax rates were essentially frozen by Indiana statute.

Faced with the uncertainty as to the source and amount of financing, and the inexorable fact that school would start in August, 1981, three of the suburban school districts,

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[2]This statute is codified at IC 20-8.1-6.5 and reproduced at State App. A-46.

Lawrence, Warren and Wayne, requested the District Court's approval of a plan under which they would annex the areas in IPS from which they would receive black IPS students. As time continued to pass without a ruling on that request, these same three school districts, together with the Metropolitan School District of Decatur Township, presented an alternative petition to the District Court seeking to impose the cost of school desegregation on the State of Indiana, arguing that the State's interdistrict violation formed the only basis for the desegregation remedy imposed by the District Court, and, consequently, it was not inequitable to impose on the State the cost of correcting that violation.

On July 17, 1981, the District Court, although finding that the proposal to annex IPS territory would offer "the best possibility for successful and long-lasting desegregation" (State App. A-42), adopted the alternative plan submitted by Lawrence Respondents with some modification. State App. A-39. The plan itself, set forth in State App. A-22 through A-36, requires the State to pay desegregation costs consisting primarily of the *excess* costs of educating the black IPS students in the suburban school districts over the cost of educating them in IPS and to pay the transportation costs incurred under the plan. In addition, the plan provides a mechanism to resolve any disputes with respect to the computation or amount of any payment required under the plan.

The Seventh Circuit affirmed the District Court in a divided opinion on March 26, 1982. State App. A-1. All members of that panel, however, voted to deny the petition for rehearing and no active member of the Seventh Circuit requested a vote on the suggestion of the State that the matter be heard *en banc*. State App. A-20.

Summary of Argument

Both the majority and dissent in the Seventh Circuit recognized that the only issue in the State's appeal is who shall pay the cost of interdistrict desegregation in Marion County, Indiana. Although the State has ostensibly raised only two questions with respect to this issue in its petition for certiorari, the State has urged at least the following grounds for reversal of the Seventh Circuit: (1) Lawrence Respondents do not have standing to raise the issue of financing the desegregation plan; (2) the order fails to give effect to the Indiana Transfer Act; (3) the order violates the Tenth Amendment; and (4) the District Court erred in failing to impose some or all of the costs of desegregation on the suburban school corporations.

With respect to the standing issue, Lawrence Respondents constituted four of the six suburban school districts charged with the responsibility of educating black IPS students transferred to them under the Court order. Without assurance of adequate funding, these school districts could not implement the desegregation plan and the education of both the transferred students and the students resident in the suburban school districts would have suffered irreparable injury. Lawrence Respondents' interest in protecting the orderly implementation of the plan and the education of their students gave them standing to seek resolution of the funding issue by the District Court.

The State's reliance on the Indiana Transfer Act as a funding mechanism for the desegregation plan ignores the fact that the statute, by its terms, simply does not apply to this case. The requirements for application of that statute, passed in 1973, conformed to school desegregation law as it then existed. This Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974) vitiated the effect of the Indiana Transfer Act and rendered it inapplicable to this case.

In requiring the State to pay the cost of interdistrict desegregation, the District Court followed the well-established principles of this Court which require the scope of a school desegregation remedy to fit the nature of the constitutional violation. In this case, it was the State's constitutional violation which formed the basis for the District Court's interdistrict desegregation plan and, consequently, it was not an abuse of discretion to require the State to pay the costs of that plan. The State's argument that this order violates the Tenth Amendment is completely answered by this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977).

Finally, the State's attempt to impose the desegregation cost on the suburban school districts is unsupported by logic, by the facts of this case or by any precedent of this Court or any other court. The suburban school districts were absolved of any legal liability for the constitutional violations in this case and, therefore, it would be inequitable to impose any of the cost of desegregation on the suburban school districts.

Argument

A. *Standing*

With respect to the question of their interest in the issue of how desegregation costs will be paid, *i.e.*, standing, Lawrence Respondents would first note that this issue was first raised by the dissent in the Seventh Circuit and has been urged by the State only in its petition for rehearing in the Seventh Circuit and now before this Court. Aside from whether the State has waived this issue, however, the practical considerations underlying Lawrence Respondents concern with respect to the question of financing justifies their standing to have that issue determined by the District Court. *See, supra*, pp. 3-4. Without adequate financing, the integration plan could not have been implemented successfully nor could the educational programs for resident students have been maintained.

In the summer of 1981, the suburban schools were faced with the responsibility of educating students transferred from IPS. This education would not be free. Further, absent some resolution of the financing issue, the suburban school districts would have to incur the costs of education and then look to some uncertain, and perhaps non-existent, entity for reimbursement of those costs. Even this alternative raised substantial problems for the suburban school districts since they were essentially prohibited from raising additional tax revenues under Indiana statute and, consequently, any additional cost of educating black IPS students would have to come out of funds budgeted for other programs.

In view of these facts, how can the State logically argue that the suburban school districts had no interest in determining the source, if any, of financing the desegregation costs? Judge Swygert, writing for the Seventh Circuit, recognized the vital interest of the suburban school districts in ascertaining the source and method of funding. State App. A-2. These interests satisfy the requirements of an actual or threatened injury and a concrete factual context embodied in the concept of standing. *See, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

In addition, the District Court found that "failure to fund adequately the education and incidental transportation costs of the transferred IPS students [would] result in irreparable harm to those students and to other students in the Receiving School Corporations...." State App. A-44. Lawrence Respondents, charged with the responsibility of educating these students, surely have standing to protect their students' education from irreparable harm. *Akron Bd. of Education v. State Bd. of Education*, 410 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974). *Cf., Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Further, Lawrence Respondents note that IPS, a district with an unquestioned direct interest in the funding issue,

and the intervening plaintiffs, representatives of all black IPS students, joined in the argument before the District Court in support of Lawrence Respondents on the responsibility for funding the desegregation plan and those issues were fully litigated in both the District Court and the Seventh Circuit. Dismissal of the case now on the question of standing would not aid the orderly implementation of school desegregation in Marion County, a process which has progressed peacefully into its second school year.

Because Lawrence Respondents had a direct stake in the outcome of the question of funding raised by their petition to the District Court, they had standing to request a ruling on that issue.

B. *The Indiana Transfer Act*

The State has repeatedly urged the District Court, the Seventh Circuit, and now this Court to construe the Indiana Transfer Act as "entitled to application absent some independent constitutional infirmity." State Petition, p. 8. What the State does not discuss is the finding by both the District Court, State App. A-40, and the Seventh Circuit, State App. A-4, that the Indiana Transfer Act, by its very terms, simply does not apply to this case. In reaching this conclusion, the lower courts have relied upon the history of the enactment of the Indiana Transfer Act, its relationship to the present case and its setting in the context of other school desegregation decisions. A brief summary of these factors demonstrates the correctness of the lower courts' decisions.

In 1973, the only constitutional violation then before the court was the intradistrict violation of IPS and the State's participation in that intradistrict violation. The District Court, relying heavily on the Sixth Circuit's decision in *Bradley v. Millikin*, 484 F.2d 215 (6th Cir. 1973), *rev'd.*, 418 U.S. 717 (1974), ordered an interdistrict desegregation plan for the Indianapolis metropolitan area, including areas outside Marion County. 368 F.Supp. 1191, 1206. The

District Court invited the Indiana General Assembly to enact such a plan and suggested several alternatives for that body to consider. 368 F.Supp. 1223-31. As an interim plan, the District Court ordered the transfer of black IPS students to suburban school corporations both inside and outside Marion County. 368 F.Supp. 1208.

Acting in response to the District Court's invitation, the Indiana General Assembly adopted the Indiana Transfer Act. That act, by its terms, applies only in the event that the following three requirements are fulfilled: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders; (b) a unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and (3) the Fourteenth Amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment. State App. A-66. As can be readily seen, these requirements were closely tailored to the findings of the District Court and the Sixth Circuit in *Bradley* and proceeded on the concept that segregation within a single school system constituted a sufficient basis for an interdistrict school remedy.

The effect of this Court's reveral of the Sixth Circuit in *Milliken v. Bradley*, 418 U.S. 717 (1974) ("Milliken I") on this case was twofold. The first and most immediate impact was to render invalid the District Court's attempt to expand the school desegregation remedy beyond IPS absent a determination that an interdistrict constitutional violation had occurred. The Seventh Circuit acknowledged this first impact in its decision vacating the District Court's 1973 judgment following this Court's decision in *Milliken I*. 503 F.2d 68. The second impact of *Milliken I*, although

perhaps not recognized by any of the parties to the case at the time, was to destroy one of the legal underpinnings of the Indiana Transfer Act by holding, in effect, that a unitary school system can always be established within the geographical boundaries of the district committing *de jure* segregation, for as this Court stated in *Milliken I:*

> In such a context, terms such as "unitary" and "dual" systems, and "racially identifiable schools," have meaning, and the necessary federal authority to remedy the constitutional wrong is firmly established. But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.
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> 418 U.S. at 746.

In short, after *Milliken I*, if the only act of school segregation in this case had been committed by IPS, then the remedy would have been limited to IPS. This rule of law is clearly inconsistent with the provisions of the Indiana Transfer Act which contemplates a court ordering transfer of students across school district lines in order to remedy desegregation occurring in only one district. Thus both the District Court and the Seventh Circuit did not err in failing to apply the Indiana Transfer Act to this case.

The State attempts to avoid this conclusion by construing certain of the holdings of the District Court prior to its 1981 decision as specifically finding the elements necessary for application of the Indiana Transfer Act. In particular, the State cites the 1975 opinion of the District Court, 419 F. Supp. 180, 184; an unpublished opinion of the District Court dated June 2, 1978, and reprinted at State App. A-54, and the opinion of the District Court at 456 F. Supp. 183, 191. The State says, quite incorrectly, that these opinions

"were never challenged or vacated in any of the numerous appeals in this case." State Petition, p. 4.

The 1975 opinion of the District Court ceased to have any effect when this Court vacated the Seventh Circuit's decision affirming that opinion and the Seventh Circuit, on remand from this Court, vacated the 1975 judgment of the District Court in an opinion reported at 573 F.2d 400.

In an unpublished opinion in 1978, the District Court took the position that the Indiana Transfer Act could form the basis of an interdistrict school remedy without regard for the question of whether an interdistrict violation occurred.[3] In its decision otherwise affirming the District Court's finding that an interdistrict violation did occur and that a desegregation plan was necessary to correct that violation, the Seventh Circuit specifically disapproved the finding that the Indiana Transfer Act afforded an independent substantive basis for the interdistrict desegregation plan. 637 F.2d at 1112.

In short, the District Court opinions cited by the State only considered the Indiana Transfer Act as a substantive basis for the imposition of the plan itself. These opinions have either been vacated by the Seventh Circuit or specifically disapproved by that court. No decision prior to the one now under appeal has considered the Indiana Transfer Act with respect to the question of funding the desegregation plan, a fact recognized by the Seventh Circuit. State App. A-4. Consequently, the decisions cited by the State bear little relevance to the issue presented here.

The decision now before this Court is the only decision in which the District Court considered directly the application of the Indiana Transfer Act to the funding

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[3]At the time of this opinion, the case was before the District Court pursuant to the remand of this Court and the Seventh Circuit for consideration of the questions of discriminatory intent.

issue. Here the District Court held that the act did not apply, State App. A-70, and the Seventh Circuit affirmed that holding, State App. A-4- A-5. These constructions of State law are generally not reviewed by this Court since "the federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).

In its only prior decision regarding the financing of desegregation, the District Court imposed all of the costs of certain ancilliary programs on the State and this allocation had been affirmed by the Seventh Circuit. 637 F.2d at 1116.

Since the Indiana Transfer Act, by its own terms, does not apply to this case, the courts below did not err in failing to follow that statute.

C. *The Tenth Amendment Issue*

The State has previously suggested that the District Court abused its discretion in assigning all of the costs to the State, and not placing some of those costs on IPS, HACI or the suburban school districts. The discretion the District Court exercised in this matter was guided by the well-established principle in school desegregation cases that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Milliken I*, 418 U.S. at 738. Here the District Court's plan was in response to the State's constitutional violation and the remedy imposed was limited to the wrongdoer.

The State argues that the District Court abused its discretion because its order violates the Tenth Amendment in that it interferes with the State's "inherent authority to structure its own finances." State Petition, p. 7. Lawrence Respondents submit that this Court answered this argument completely in *Milliken v. Bradley*, 433 U.S. 267

(1977) (*"Milliken II"*). In that case, Chief Justice Burger, writing for the Court, swept away the Tenth Amendment objection of Michigan to paying a portion of the costs of certain educational components of the Detroit desegregation plan, stating:

> The Tenth Amendment's reservation of nondelegated powers to the state is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. (Citation omitted). Nor are the principles of federalism abrogated by the decree.
>
> 433 U.S. at 291.

In his concurring opinion to that case, Justice Powell elaborated on Michigan's concerns and their irrelevance to the constitutional questions relating to the scope of the remedy that were before this Court:

> Thus the only complaining party is the State of Michigan (acting through state officials), and its basic complaint concerns *money*, not desegregation. It has been ordered to pay about $5,800,000 to the Detroit School Board. This is one-half the estimated "excess costs" of four of the eleven educational components included in the desegregation decree.
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> * * *
>
> The State Board normally would be enthusiastic over enhancement of these programs so long as the local school board could fund them without requiring financial aid from the state. It is equally evident that the state probably would resist a federal-court order requiring it to pay unappropriated state funds to the local school board regardless of whether violations by the local board justified the remedy. The state's interest in protecting its own budget — limited by legislative appropriations — is a genuine one. But it is not an interest that is related, except fortuitiously, to a claim that the desegregation remedy may have

> exceeded the extent of the violations.
>
> 433 U.S. at 293-94, 295-96 (Emphasis in original).

The State would distinguish *Milliken II* by suggesting that the District Court's order violates the language in that decision which states:

> The district court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing.
>
> 433 U.S. at 291.

As further support for this position, the State cites *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), which reversed the action of the district court in setting a local property tax rate.

But the judgment of the District Court at issue here does not contain the restructuring forbidden by *Milliken II*, nor does it result in interference with state and local processes condemned in *Evans*. As the Seventh Circuit previously noted, the District Court did not exercise its undoubted power to restructure school organization in Marion County. 637 F.2d 1114. Nor did the District Court mandate a particular method of financing. The District Court did not establish tax rates as in *Evans* nor change the method or structure by which tax rates are to be determined. The District Court did not suggest a method by which the State will finance its obligations under the judgment. As the Seventh Circuit noted, the State remains free to cut programs rather than raise taxes and to cut programs as it, and it alone, chooses. State App. A-11. The only thing the State may not do is totally shirk its responsibility to pay for the extra educational costs incurred in connection with a transfer of students resulting from the State's interdistrict violations. Also, it may not accomplish indirectly what it cannot do directly — impose that cost solely on the other parties to this action.

The State can find no support for its argument in any other school desegregation decision on the responsibility for desegregation costs. Both the Eighth Circuit[4] and Sixth Circuit[5] have imposed such costs on the state where the state shared in the responsibility for the racial segregation. Although these decisions have limited the state's liability to approximately one-half of the costs of desegregation, these decisions involved desegregation solely within one school district in a situation where that district itself had committed independent acts of *de jure* segregation. Thus, as the Seventh Circuit found, these cases are clearly distinguishable from the present case where the State alone committed the interdistrict violation giving rise to the specific interdistrict remedy imposed by the District Court. State App. A-7 - A-8.

The State further tries to distinguish this case from *Milliken II* by suggesting that the existence of the Indiana Transfer Act and the requirement of the District Court that the State pay costs from otherwise unappropriated funds violates the mandates in *Milliken II*. With respect to this first issue, the State seems to be suggesting that if a state enacts a statute imposing desegregation costs solely on the school districts involved in the desegregation plan, then the State can avoid responsibilities for those costs regardless of whether the State committed interdistrict or intradistrict school violations.

Lawrence Respondents submit that the equity power of the federal district courts in remedying school discrimination are not so easily avoided. The requirement of this Court is that the remedy imposed by the federal district courts be commensurate with the violation found

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[4]*Liddell v. Bd. of Education of the City of St. Louis*, 667 F.2d 643 (8th Cir.), *cert. denied*, 50 U.S.L.W. 3447 (December 1, 1981).

[5]*Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 72 L.Ed.2d 135 (1982); *Peneck v. Columbus Bd. of Education*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 72 L.Ed.2d 135 (1982).

by those courts, *Milliken I*, and what could be more equitable than requiring the State to pay the costs of a plan which resulted from its own constitutional violation? Or, as the District Court stated, "Because the decision of this Court found [the State] responsible for interdistrict fourteenth amendment violations and fixed the remedy therefor, the State should be required to pay the costs of that remedy." State App. A-41.

The decision of the District Court requiring funds to finance the plan to come from monies not otherwise appropriated by the State also does not violate state sovereignty. In light of the circumstances facing the District Court at the time the financing plan was approved, the Court had little choice under Indiana law but to order the funds to come from otherwise unappropriated monies. As the Seventh Circuit noted, the District Court did not interfere with the State's unquestioned right to appropriate monies to pay those costs from whatever source the State chose, when the State does choose to appropriate monies. State App. A-11.

D. *The "Guilt" of the Suburban School Districts*

In this Court, the State has apparently abandoned its prior efforts to shift the desegregation costs to IPS or HACI. This is not surprising, however, in view of the Seventh Circuit's findings that the HACI violation would not support the scope of the District Court's plan and that the IPS intradistrict violations were without interdistrict effect. 637 F.2d at 1111-4. Instead, the State has focused on the suburban school districts and the actions of their patrons' representatives in the Indiana General Assembly.

The State has seized upon a novel theory of the dissent in the Seventh Circuit, a theory which suggests that only a portion of a state should be held responsible for acts of the state's legislature. The State has combined this theory with its own novel theory, that the decision of the District Court

is inequitable because it does not provide incentives for the parties to "explore alternative desegregation plans or to modify what is a patently flawed final substantive decree," to argue that the suburban school districts should be forced to pay an unspecified portion of the desegregation costs. State Petition, p. 11. In fact, the State goes so far as to suggest that the decision of the District Court awards state funds "to a primary wrongdoer, upon that wrongdoer's own petition." State Petition, p. 13. In short, it appears that the State, by some form of legal legerdemain, is attempting to create a violation which has been specifically found not to exist, to avoid responsibility for a violation that has been found to exist, and to question the validity of a *final* judicial decree.

With respect to the alleged suburban school liability for the interdistrict violation, the law in this case is abundantly clear. The District Court found that the suburban school corporations did not commit any act of segregation. No one has questioned this finding, first made in 1973.

The dissent in the Seventh Circuit, in an argument now championed by the State, argues that the suburban school districts should bear responsibility for the cost of desegregation because suburban Marion County legislators procured the "school exception" to Unigov, an exception which proved to be the basis of the District Court's interdistrict school remedy and, therefore, the constituents of those legislators, *i.e.*, the patrons of the suburban school districts, should be punished by being forced to bear the costs of desegregation.

Neither the State, nor the dissent before it, has cited any precedent for this theory that only certain citizens of a State should bear resbonsibility for an act of the State's entire legislative body. Furthermore, Lawrence Respondents note that the assumptions underlying this theory are not supported by the record in this case and that adoption of this theory would raise difficult questions in both this case and future decisions.

Underlying the State's arguments is the assumption that legislators outside Marion County apparently voted for Unigov with the school exclusion either because they did not understand the question, did not care, or both. Yet it was this very failure of legislators outside Marion County to be concerned about segregation in IPS which led the District Court to conclude that these legislators had violated their constitutional duty. 419 F. Supp. 183.

Lawrence Respondents submit that the assessment of "blame" for Unigov serves no purpose. The acts of the majority of the General Assembly are, by definition, the acts of the State and the vote of an individual legislator for an act can not impose the consequences of the act's passage solely on his constitutents any more than the vote of an individual legislator against an act can relieve his constitutents from the consequences of its passage. Yet this is precisely the rationale used by the State in an attempt to impose the costs of desegregation upon the patrons of the suburban school districts because their legislators were "responsible" for the interdistict violation.

Accepting the State's theory would require courts to scrutinize each legislator's vote to determine which constituents would bear the burden of any particular legislative act.[6] Perhaps that vote would only be a presumption as to the constituents' responsibility, however, and the constituents could overcome that presumption by proving they really did not support the act and, consequently, they should not be forced to obey it or bear its consequences. The lack of logic or equity in such a theory is equalled only by the lack of precedent supporting it.

The State now expresses concerns regarding the fact that the parents of black IPS students transferred to the

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[6]This might lead to some interesting problems in this case since two of the "guilty" suburban legislators voted against Uni-Gov. Should their constituents be exempted from either the desegregation plan or the cost thereof?

suburban school districts can not vote for school boards in the districts their children attend school, or otherwise participate formally in the government of those schools. The State has been the party to this case at all times in which the desegregation plan has been considered and has participated in all proceedings resulting in implementation of that plan. The desegregation plan ordered by the District Court has been affirmed on appeal and this Court has denied review of that plan. It seems a bit unusual for the State to raise its concerns about the plan for the first time in a petition for certiorari to this Court, after the plan has been rendered as part of a final decree and implemented for two school years, and only in connection with the question of whether the State should bear the costs of that decree.

Lawrence Respondents submitted a plan which called for annexation of a portion of IPS in the remedy phase of this case in 1978, partially because a simple transfer of students without territory would deprive parents of the right to vote for the school board. The Lawrence, Warren and Wayne school districts stated their willingness to annex that portion of IPS from which they receive black students again in 1981.

Lawrence Respondents firmly believe, however, that it is too late for the State to obtain reversal of the decree ordering a desegregation plan after this Court has denied certiorari to review the plan and, in any event, that "shortcomings" in the plan now perceived by the State do not justify allowing the State to escape responsibility for desegregation costs incurred in implementing the plan as ordered by the court.

Conclusion

The duty of a district court in a school desegration case is to eliminate all vestiges of racial discrimination. To suggest that this duty does not extend to insuring that there

is adequate funding to accomplish that task, or that the source of such funding is not a federal question, is to ignore the reality that educating students requires money.

Given the finding that the State of Indiana is liable for interdistrict segregation in Marion County, the District Court's decree imposing the cost of the interdistrict remedy on the State is hardly extraordinary. Indeed, in light of these findings and the law in school desegregation cases that the remedy must be tailored to the violation, a contrary result would be inconsistent with prior precedents of this Court.

For these reasons, Lawrence Respondents submit that the State's petition should be denied.

Respectfully submitted,

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